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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER JAMES, Defendant and Appellant.	A152400 (Humboldt County Super. Ct. No. CR1603409A)

Defendant Francisco Javier James appeals after a jury convicted him of two counts of burglary. (Pen. Code,[1] § 459.) Defendant contends the judgment must be reversed because: (1) the trial court erroneously denied his motion to quash search warrants or exclude evidence obtained from a cell phone that allegedly belonged to him; (2) the trial court failed to impose any sanctions on the prosecution for unreasonably delaying production of discovery; and (3) defense counsel was constitutionally ineffective in preparing for trial and advising defendant during plea negotiations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant was charged with first-degree residential burglary (§ 459; count 1) and second-degree burglary (§ 459; count 2). The information alleged that defendant was ineligible for probation as a result of five prior felony convictions for burglary, assault

[1] All statutory references are to the Penal Code unless otherwise specified.

[2] Additional facts relevant to the issues raised on appeal are set forth in the respective parts of the Discussion below.

with a deadly weapon, unlawful possession of a firearm, and evading an officer. (§ 1203, subd. (e)(4).)

The evidence at trial established the following. The burglarized residence was a house in Fortuna shared by Tezrah Johnson, her mother Tanya Rock, Rock's boyfriend Jose Moreno, and Moreno's daughter. Moreno had another daughter named Samantha, who was married to defendant. Neither Samantha nor defendant lived in the Fortuna house or had permission to be in the house when the residents were not present.

On the night of July 23, 2016, Johnson left the Fortuna house and went to a party with her friends Cody Gardener and McKenzie Crenshaw. Johnson testified that she and Gardener drank alcohol and smoked marijuana at the party. The three returned to the Fortuna house at around 2:30 a.m. to find the lights on, the door to Rock and Moreno's bedroom kicked in, and bags filled with household items on the floor. Johnson said, " 'Someone broke into my house' " and then saw defendant and Samantha in the kitchen where Rock and Moreno kept a large safe. Johnson saw defendant from the side of his face, which he shielded from view with his arm, but Johnson also saw a star tattoo on his elbow. Johnson had seen defendant more than 15 times in the past three years and knew he had star tattoos on his elbows.

The intruders fled the house, and Johnson ran after them. Gardener also ran outside and was eight to ten feet away from the intruders when he recognized them as Samantha and defendant. Gardener testified that "everyone was freaking out, yelling at each other, trying to figure out what was going on." After the intruders escaped, Johnson, Gardener, and Crenshaw walked around the neighborhood and found a green Ford Expedition parked in a nearby business lot. Johnson looked inside the vehicle and recognized an orange "weed eater" and a baby stroller that had been stored in a shed behind the Fortuna house. Johnson knew the Ford belonged to defendant and Samantha because they had previously driven it to the Fortuna house and parked it there, and Johnson believed defendant and Samantha were living in the vehicle. Gardener testified that he saw Samantha driving the Ford with defendant in the passenger seat at around 11 a.m. the morning before the burglary.

Johnson called 911, and Fortuna Police Officer Lindsey Frank arrived at around 2:45 a.m. She did a walkthrough of the house and saw signs of forcible entry and property strewn about. Frank observed that Gardener was "highly intoxicated" and "[h]is emotions were up and down," but that Johnson did not exhibit signs of intoxication.

Officer Frank had the Ford towed to an impound lot and issued an alert for defendant and Samantha. When Samantha arrived at the lot later that morning to claim the vehicle, she was arrested and searched. Frank recovered a silver Samsung cell phone from a search of Samantha's person (cell phone 1), and makeup products that Johnson later testified were taken from her bathroom. Samantha told Frank she had Moreno's permission to take the weed eater, but Moreno and Rock testified that Samantha and defendant did not have permission to take anything from the Fortuna house.

Officer Frank testified that in August 2016, she obtained a warrant to search the impounded Ford. Inside the vehicle were the stolen weed eater and baby stroller, a bag of jewelry, Samantha's purse and wallet containing drivers licenses for both her and defendant, a prescription medication bottle with defendant's name on it, mail in the names of defendant and Samantha, and defendant's Samsung cell phone (cell phone 2) on the front passenger seat. Frank further testified that two searches of cell phone 2 were conducted in April 2017, the first of which yielded two photographs and a video that were admitted at trial. One of the photographs was taken on the day of the burglary and depicted Samantha leaning against a green vehicle. The other photograph was a "selfie" of defendant, and a selfie video (which was muted when played at trial) showed defendant inside a vehicle.

Defendant presented an alibi defense. Joyce Retzloff testified that on the night of the burglary, defendant had asked her to meet with Samantha and retrieve his cell phone from her. Retzloff met Samantha, who was with a man Retzloff did not know, and Samantha gave Retzloff money to give to defendant. Retzloff delivered the money to defendant at around midnight.

Defendant also submitted an exhibit containing 48 text messages obtained from a data extraction of cell phone 1. The text messages purportedly showed that defendant

and Samantha were estranged in the days leading up to and including the day of the burglary.

On April 25, 2017, the jury convicted defendant of both burglary counts and found, as to count 1, that a person not an accomplice was present in the residence, qualifying the offense as a serious and violent felony. Defendant was sentenced to a total term of eight years, four months in state prison.

DISCUSSION

A. Motion to Quash Search Warrants and Exclude Evidence

Defendant claims the trial court committed reversible error when it denied his pretrial motion to quash the search warrants or exclude evidence obtained from the searches of cell phone 2 (defendant's cell phone) because the information in the affidavits supporting the warrants was stale.

1. *Additional Background Facts*

On April 4, 2017, Officer Frank obtained the first of two warrants to search cell phone 2. In her affidavit supporting the April 4 search warrant, Frank provided a statement of probable cause detailing her response to the burglary, the statements of the witnesses, and her seizure of the Ford and cell phone 2.

After the warrant issued, Officer Frank delivered cell phone 2 to investigator Martin Perrone. Perrone testified that he removed the cell phone from its envelope, "powered on the cellphone," and attached it to a machine used to conduct the search. Because the cell phone was pattern-locked, Perrone was not able to obtain a full extraction of data, but he was able to extract locations, timelines, audio files, two documents, 675 images, three text documents, and 81 videos. On April 14, 2017, the prosecutor provided defense counsel with the partially downloaded data from cell phone 2.

The People sought to admit six items from cell phone 2, including two videos depicting defendant (one in which he was engaged in intimate acts with Samantha), a selfie photograph of defendant, and a still photograph taken on the day of the burglary of Samantha posing against a green vehicle. The People argued this evidence established

that defendant was the owner of cell phone 2 and rebutted defendant's theory that he and Samantha were estranged and did not commit the burglary together.

Defendant moved in limine to quash the search warrant and exclude the records obtained from the search of cell phone 2, arguing the information in the supporting affidavit was stale due to the passage of time and the officers' failure to protect the phone from outside influence. The trial court denied the motion, finding the information was not stale because the phone was lodged and retained in evidence at the Fortuna Police Department, and there was no evidence that any information on the phone had been manipulated. Out of the six items sought to be introduced by the prosecution, however, the court allowed only the photograph of Samantha leaning against the green vehicle, the selfie of defendant, and a muted selfie video of defendant inside a vehicle.

Thereafter, on April 20, 2017, the prosecutor informed Officer Frank that the passcode for cell phone 2 had been obtained from recordings of jail phone calls between defendant and an unidentified third party.[3] Frank prepared a new search warrant for a full data extraction of cell phone 2. In her affidavit supporting the second search warrant, Frank repeated the facts in her prior affidavit along with the following additional facts: she delivered cell phone 2 to an investigator at the district attorney's computer forensics lab; a full data extraction could not be accomplished because the phone was pattern-locked, but the search still yielded information beneficial to the investigation; and the prosecutor thereafter obtained the passcode to cell phone 2, allowing for a full data extraction.

Defendant moved to quash the second search warrant, but the trial court found the second search of cell phone 2 appropriate based on the People's recent discovery of the pattern-lock code. However, when the People later sought to introduce a text message sent from cell phone 2 shortly before the burglary, the court excluded the message on the grounds that its probative value was substantially outweighed by the probability of

[3] There is no indication in the record as to when the passcode disclosure took place.

confusion and/or danger of undue prejudice. Ultimately, no evidence from the second search of cell phone 2 was admitted at trial.

2. *Staleness*

Defendant argues the information in the search warrant affidavits was too stale in time to establish probable cause that evidence of criminal activity would be found on cell phone 2, as nearly nine months had elapsed between the burglary and the issuance of the warrants, and during that time, the phone was left unsecured from outside influence.

A search warrant cannot be issued but upon probable cause, supported by affidavit. (§ 1525.) " 'Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place" ' " at the time the search is conducted. (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504 (*Hirata*).) Stale information in a search warrant affidavit does not establish present probable cause for a search. (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652 (*Hulland*).) Although it has been held that " 'delays of more than four weeks are generally considered insufficient to demonstrate present probable cause' " (*Hirata*, at p. 1504), "[n]o bright-line rule defines the point at which information is considered stale." (*People v. Carrington* (2009) 47 Cal.4th 145, 163.) Ultimately, " 'the question of staleness depends on the facts of each case.' " (*Ibid*.) On review from a trial court's denial of a motion to suppress evidence obtained by search warrant, we review the court's factual findings for substantial evidence and independently determine the search's legality upon the established facts. (*People v. Suff* (2014) 58 Cal.4th 1013, 1053.)

We conclude the facts in the search warrant affidavits for cell phone 2 were not stale despite the lapse of several months. "Substantial delays do not render warrants stale where the defendant is not likely to dispose of the items police seek to seize." (*People v. Stipo* (2011) 195 Cal.App.4th 664, 672.) Both cell phone 2 and defendant were in the custody of law enforcement since the day of the burglary, and because defendant, the owner of cell phone 2, had no access to the phone since the time it was seized, there was a fair probability that whatever information was in the phone on the day of the burglary was still there when the search warrants were sought.

The general presumption of staleness after four weeks does not apply under these circumstances. Unlike *Hirata* and *Hulland*, this case does not involve affidavits describing solitary drug deals that occurred several months prior to a challenged search, with no indication of ongoing criminal activity in the meantime. (See *Hirata*, *supra*, 175 Cal.App.4th at p. 1505; *Hulland*, *supra*, 110 Cal.App.4th at pp. 1652–1653.) Here, the issue is not whether ongoing criminal activity could be inferred from past acts, but rather, whether it is reasonable to infer that cell phone 2's contents remained the same during the time that the phone and its owner were both in the custody. Furthermore, the second Frank affidavit stated additional facts regarding the beneficial results of the first search of cell phone 2 and the discovery of its passcode. This was new, not stale, information supporting the second search of cell phone 2.

Defendant contends the officers' failure to put cell phone 2 in airplane mode rendered the information in the affidavits stale. But substantial evidence supports the inference that cell phone 2 was powered off and in the custody and control of law enforcement since the date of the burglary. Thus, there was little reason to believe that the phone had been tampered with or that any evidence therein had been destroyed. (See *Riley v. California* (2014) 573 U.S. 373, 389–390 (*Riley*) [holding remote wiping is not prevalent and officers can power off cell phone to protect against it].)

It makes no difference that the People eventually learned on April 20, 2017, that defendant had disclosed the phone's passcode to a third party. This fact was not known to the investigators when the first search warrant was sought, and it is not clear when defendant gave out the passcode. Because there was no evidence indicating that cell phone 2 was capable of being remotely wiped prior to the first search, it was not unreasonable for the officers to believe the contents of cell phone 2 remained in the same condition as they did when the phone was first seized. Moreover, although the investigators knew about the passcode disclosure prior to the second search, any purported error was harmless beyond a reasonable doubt because no evidence from the second search was admitted at trial. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Defendant argues more fundamentally the search warrant affidavits were lacking in sufficient facts indicating that cell phone 2 belonged to him or contained evidence pertaining to a crime. We disagree. The affidavits described defendant's link to the burglary and cell phone 2 in numerous ways: he was identified by two eyewitnesses as one of the burglars; he was known to be living in the Ford and was seen riding in the Ford's passenger seat the morning before the burglary; the Ford was found near the Fortuna home containing stolen goods; cell phone 2 was found on the Ford's passenger seat, along with defendant's driver's license, mail, and prescription medication bottle; and a cell phone belonging to Samantha was found on her person at the time of her arrest, suggesting the cell phone found in the Ford belonged to someone else. These facts supported a fair probability that cell phone 2 belonged to defendant and contained evidence pertaining to the burglary.

We find no reversible error in the trial court's refusal to exclude evidence obtained from cell phone 2 on staleness grounds.

B. Motion to Dismiss for Discovery Violations

Defendant argues the trial court violated his due process right to a fair trial when it denied his motion in limine to dismiss the burglary charges, failed to impose sanctions on the People for unreasonably delaying production of mandatory discovery, and denied his request for a jury instruction on untimely disclosure of evidence.

1. *Additional Background Facts*

a. Data Extraction of Cell Phone 1

In October 2016, defendant filed a motion under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and section 1054.5, requesting "all data contained within the cellular phone seized from Samantha James [cell phone 1] by law enforcement on July 24th, 2016." Defendant argued the People refused to provide the data due to the requirement under the California Electronic Communications Privacy Act (ECPA) that disclosures of cell phone data be made pursuant to a court order.

The trial court (Hon. Marilyn Miles) granted defendant's motion and directed the parties to reach a stipulation regarding custody of cell phone 1. The parties failed to

reach a stipulation, however, and the People continued to raise issues regarding the ECPA and Samantha's consent. A different judge later barred further searches of the phone pending Judge Miles's clarification of her prior order. Thereafter, Samantha withdrew her consent to the search of her phone.

In February 2017, Judge Miles ordered that "a complete data extraction of [cell phone 1] be transferred to" defendant. The People moved to modify Judge Miles's order, arguing that due to Samantha's withdrawal of consent, the court should order the phone be made available for examination by an expert of defendant's choosing. After an in camera hearing, the trial court vacated its previous order, and it was agreed that the People would make cell phone 1 available for examination by the defense. Samantha consented, and on April 6, 2017—11 days before trial—defendant's cell phone expert performed the data extraction of cell phone 1.

Defendant moved in limine to dismiss the burglary charges, arguing the People violated *Brady* and his due process rights by delaying production of the contents of cell phone 1. Defendant argued the phone contained exculpatory evidence in the form of text messages indicating that there was "a parting of ways" between him and Samantha and that they were not on speaking terms at the time of the burglary. The trial court denied the motion, finding that although the People did not comply with their discovery obligations, the delay was unintentional. The court indicated it would consider giving an appropriate jury instruction on late discovery.

b. Recorded Interviews and Jail Phone Call Recordings

On the morning of April 19, 2017, before the presentation of evidence, the prosecutor informed the trial court and defense counsel that she had conducted recorded interviews with Johnson, Gardener, and another witness a few days prior. Defense counsel was given the opportunity to immediately listen to the interviews.

The trial court was also informed that the People intended to produce recordings of more than 900 jail phone calls dating back to September 2017. The prosecutor explained that the recordings were of defendant's phone calls, and she did not know what was on the recordings or whether they were going to be admitted into evidence. In a later

colloquy outside the presence of the jury, the trial court expressed concern about defense counsel's ability to review the jail phone call recordings given the late stage of the proceedings. The prosecutor agreed, but stated that because she had the recordings, she gave them to the defense. The prosecutor further surmised that there might be impeachment evidence in the recordings. The court ultimately ruled that the jail phone call evidence would not be allowed during the prosecution's case-in-chief, and no reference to the calls would be made unless addressed in advance outside the presence of the jury. No jail call recordings were admitted at trial.

c. Jury Instruction Request

After the close of evidence, defense counsel requested an instruction under CALCRIM No. 306 on late discovery.[4] The trial court denied the request, finding there was no untimely disclosure of evidence because "there was the basis for the People not to disclose it earlier, out of concern for Miss James' privacy rights, and her cellphone."

2. *Failure to Disclose* Brady *Material*

Defendant argues the trial court violated his due process rights to a fair trial and to present a full defense when it failed to sanction the prosecution for its unreasonably delayed production of exculpatory *Brady* material.

To establish a *Brady* violation, a defendant must show: (1) the evidence at issue is material and favorable to the accused, either exculpatory or impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*).) Evidence is favorable "if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) Prejudice, in the *Brady*

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[4] CALCRIM No. 306, entitled "Untimely Disclosure of Evidence" provides, in relevant part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose: <*describe evidence that was not disclosed*> [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

context, "focuses on 'the materiality of the evidence to the issue of guilt or innocence.' " (*Salazar*, at p. 1043.) Evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*Kyles v. Whitley* (1995) 514 U.S. 419, 433.) "The requisite *reasonable probability* is a probability sufficient to undermine confidence in the outcome on the part of the reviewing court. It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract." (*People v. Dickey* (2005) 35 Cal.4th 884, 907–908 (*Dickey*).) We independently review whether a *Brady* violation occurred, but the trial court's findings of fact are given great weight if they are supported by substantial evidence. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

The only evidence in question that was arguably "favorable" to the defense within the meaning of *Brady* were the text messages obtained from cell phone 1 purporting to show the estrangement between defendant and Samantha at the time of the burglary. Defendant does not identify any exculpatory evidence contained in cell phone 2, the recorded interviews, or the jail call recordings.

A delayed disclosure of favorable evidence may violate *Brady* if the delay itself causes prejudice. (*O'Hara v. Brigano* (6th Cir. 2007) 499 F.3d 492, 502.) That is not the case here. Defense counsel received the discovery 11 days before trial, and defendant does not contend his counsel lacked sufficient time for its review. Indeed, counsel discovered and presented 48 of the cell phone 1 text messages in support of the estrangement premise of defendant's alibi defense. Meanwhile, there was ample independent evidence of defendant's guilt, including eyewitness identification of defendant as the male intruder and indicia of his presence in the Ford containing the stolen goods. On this record, our confidence in the outcome of the trial is not undermined by the delayed production of evidence from cell phone 1. (*Dickey*, *supra*, 35 Cal.4th at pp. 907–908.)

3. *Reciprocal-Discovery Statute*

Defendant argues the People violated the reciprocal-discovery statute (§ 1054 et seq.) and failed to demonstrate good cause for the belated disclosure of evidence. Defendant contends the delay and the trial court's unreasonable failure to take any remedial action—including giving a jury instruction under CALCRIM No. 306—forced him to relinquish his rights to effective counsel and a fair trial.

Section 1054.1 provides, in pertinent part, that the prosecution must disclose to the defendant all relevant evidence seized or obtained as part of the investigation of the charged offenses, any exculpatory evidence, and any relevant written or recorded statements of witnesses whom the prosecutor intends to call at trial, if these materials are "in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." (§ 1054.1, subds. (c), (e), (f).) "Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133.)

Trial courts have broad discretion in determining if a party has violated the discovery statutes and whether to impose sanctions for any such violation. (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Curl* (2009) 46 Cal.4th 339, 357.) A court may enforce the discovery provisions by ordering immediate disclosure, contempt proceedings, or a continuance of the matter, or by delaying or prohibiting a witness's testimony or the presentation of real evidence. The exclusion of testimony, however, "is not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358 (*Jordan*).) "A violation of section 1054.1 is subject to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836." (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

Here, although law enforcement seized cell phone 1 during Samantha's arrest, the actual extraction of data was delayed for several months by the parties' multiple attempts at stipulation and clarification from the trial court on how the extraction was to proceed.

True, the People produced the cell phone 1 data to the defense within 30 days of trial. But the data was disclosed immediately after it was obtained. (§ 1054.7.) Likewise, the recorded interviews were "obtained" by the prosecution within 30 days of trial and immediately disclosed to the defense. (*Ibid.*)

As for the jail call recordings, even if the People violated the discovery statutes in producing this evidence, there has been no showing of prejudice from the delay. Notably, the evidence was never admitted at trial. Defendant, however, argues it is not possible to know if other favorable evidence in the jail call recordings was missed because the prosecution's delays deprived defense counsel of the time needed to conduct a competent review. This speculative argument does not establish prejudice. Defendant fails to identify anything in the recordings which, if given sufficient time to discover at trial, would have had a reasonable probability of changing the outcome. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836–837.)

With regard to the production of data from cell phone 2, even if we were to agree with defendant that the People were dilatory, there was no evidence of "willful conduct motivated by a desire to obtain a tactical advantage at trial" (*Jordan*, *supra*, 108 Cal.App.4th at p. 358) to justify an exclusion sanction. Nor was there a showing of "significant prejudice." (*Ibid.*) The trial court excluded half the evidence from cell phone 2 that the People sought to introduce, and the prosecutor did not rely on this evidence in her opening argument or in the initial portion of her closing argument. It was only on rebuttal, after defense counsel proposed the estrangement theory during his closing argument, that the prosecutor briefly mentioned the single photograph of Samantha taken on cell phone 2 the day of the burglary.

Defendant argues the trial court should have imposed some other meaningful sanction for the delayed production of evidence, but the only relief he sought was dismissal and a CALCRIM No. 306 instruction. Additionally, defendant contends the failure to give the requested instruction was prejudicial because the eyewitnesses were vulnerable to impeachment due to their intoxication and distress, and the late-produced evidence from cell phone 2 provided crucial corroboration that was otherwise missing.

Even assuming the court's refusal to give CALCRIM No. 306 was error, we find no resulting prejudice. The photographs and video from cell phone 2, though probative in suggesting defendant's ownership of the phone, were not emphasized in the People's case. But other strong evidence connected defendant to the burglary, not the least of which was the eyewitness testimony of Johnson and Gardener. Although Officer Frank observed that Gardener was highly intoxicated when he implicated defendant in the burglary, Frank saw no evidence that Johnson was intoxicated when she identified defendant as the intruder. Defendant was independently linked to the burglary by the stolen property and the presence of his personal items found in the Ford. Meanwhile, defendant's estrangement theory was undermined by Gardener's trial testimony that he saw defendant with Samantha in the Ford on the morning before the burglary.

On this record, we find no reversible error in the trial court's denial of the motion to dismiss or its failure to impose sanctions or instruct with CALCRIM No. 306.

C. Ineffective Assistance of Counsel

Defendant argues his counsel rendered ineffective assistance when the People's delayed production of discovery made it impossible for counsel to competently investigate all possible defenses, determine an appropriate defense strategy, and advise defendant concerning the prosecution's plea offer.[5]

A defendant claiming ineffective assistance of counsel must show both deficient performance under an objective standard of professional reasonableness, and prejudice under a test of reasonable probability of a different outcome. (*People v. Jones* (1998) 17 Cal.4th 279, 309.) A reasonable probability is "a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to

[5] On April 19, 2017, defense counsel informed the trial court that defendant had rejected the People's final offer to plead open to the first-degree residential burglary charge. Given defendant's status on felony probation, counsel observed that the plea would have required a "mandatory prison sentence."

provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*).)

The same two-part test applies to a defendant's claim that counsel's ineffective representation resulted in the rejection of a plea offer. (*In re Alvernaz* (1992) 2 Cal.4th 924, 934 (*Alvernaz*).) With respect to the performance prong, "defense counsel must communicate accurately to a defendant the terms of any offer made by the prosecution, and inform the defendant of the consequences of rejecting it." (*Id*. at p. 937.) "To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Ibid*.)

We find no merit in defendant's ineffective assistance claim, which he admits "reflects no fault of defense counsel." The record shows that defense counsel made timely objections and motions claiming prosecutorial delay in providing discovery, and because of his effective advocacy, the trial court imposed several limitations on the evidence obtained from cell phone 2 and the jail call recordings. Defendant does not contend his counsel failed to raise any objection, argument, or defense that a reasonably competent attorney would have made.

For the same reasons, there appears no merit to defendant's ineffective assistance claim in connection with plea bargaining. Defendant points to no deficiencies in his counsel's communication of the terms of the plea offer or the consequences of its rejection.

Nor has defendant demonstrated prejudice under the reasonable probability standard, i.e., a probability sufficient to undermine confidence in the outcome. (*Strickland*, *supra*, 466 U.S. at p. 694.) As we have discussed, the cell phone 1 evidence was produced with sufficient time for defense counsel to discover and utilize 48 text messages to support the defense's estrangement theory; the cell phone 2 evidence was limited by the trial court and was neither a focal point of the prosecution's case nor the only evidence corroborating the eyewitnesses' accounts; and the jail call recordings were

not allowed during the People's case-in-chief and never came into evidence. Defendant does not identify any additional evidence from the People's delayed production that could have been developed to support his defense had there been more time to investigate.

As for defendant's rejection of the plea offer, the record sheds no light as to the considerations and advice from counsel that informed his decision.[6] Therefore, the claim appears more appropriately decided in a habeas corpus proceeding. (*Mendoza Tello, supra,* 15 Cal.4th at p. 267.) At any rate, defendant's arguments regarding prejudice are without merit. He argues he was prejudicially uninformed because the People's "surprise evidence greatly increased the risk of conviction by undermining his only defense, alibi, and threatened to expose potential defense witnesses to unknown but possibly significant impeachment," and this "changed the evidentiary landscape to such a degree that it was likely [he] would have accepted the plea offer if he had been fully informed by an adequately prepared counsel." But the record shows that at the time defendant rejected the People's final plea offer, the trial court had already denied his challenges to the admission of the cell phone evidence that undermined his estrangement theory. And defendant's argument that the threat of "unknown" impeachment material in the jail phone calls (*his own* phone calls) would have likely caused him to accept the plea offer is conclusory and unworthy of serious consideration.

We conclude defendant has not demonstrated a reasonable probability that he would have accepted the offer but for the effect of the People's delay on defense counsel's plea advice. (*Alvernaz, supra,* 2 Cal.4th at p. 937.)

D. Cumulative Error

Defendant argues the cumulative effect of the alleged errors rendered his trial fundamentally unfair. We conclude that any errors we have assumed for purposes of argument were harmless under any standard, whether considered individually or

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[6] If anything, the record suggests defendant's decision to reject the plea was based on his to desire to avoid prison. At the sentencing hearing, defense counsel explained that he advised defendant he would be ineligible for probation given his five prior felony convictions. There simply was no disposition that would allow defendant to avoid prison time, hence counsel remarked, "[s]o we did the trial."

collectively, and they did not deny defendant due process or a fair trial. (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

DISPOSITION

The judgment is affirmed.

_____
Fujisaki, Acting P. J.

WE CONCUR:

_____
Petrou, J.

_____
Wiseman, J.*

A152400

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.